

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

CTIA Petition for Rulemaking Regarding the)	
Transition of Part 22 Cellular Services to)	RM No. 11510
Geographic Market-Area Licensing)	

To: Chief, Wireless Telecommunications Bureau

COMMENTS OF COMMNET WIRELESS, LLC

David J. Kaufman
Stephen E. Coran
Rini Coran, PC
1615 L Street NW, Suite 1325
Washington, DC 20036
(202)-296-2007

Its Attorneys

February 23, 2009

TABLE OF CONTENTS

<u>Item</u>	<u>Page</u>
SUMMARY	i
DESCRIPTION OF COMMNET AND ITS INTEREST	1
DISCUSSION	5
I. The CTIA Petition Is Not the Best Way to Achieve Its Stated Policy Goals	5
II. The Current Rules Are Technology-Neutral and Allow Carriers to Rapidly Modify Their Systems to Meet Local Market Needs	7
III. Changing to Geographic-Area Licensing Would Not, in the Absence of a Spectrum Give-Away, Reduce the Amount of Technical Information for ULS to Collect and Maintain	9
IV. The Proposal on How to Give Away the Remaining White Space Is Irrational and Unfair to Rural Carriers Such as Commnet	11
V. The Proposed “Interim” Freeze Is Contrary to the Public Interest and Will Block the Initiation of Service to Additional Rural Areas Indefinitely	12
CONCLUSION	14

SUMMARY

Commnet Wireless, LLC (“Commnet”) is a premier wireless carrier specializing in bringing service to rural and remote areas that the major national and regional carriers have declined to serve. For the reasons discussed herein, Commnet opposes the CTIA Petition.

Commnet serves as a “carriers’ carrier”, providing service to areas that other carriers do not serve, and thereby extending the effective coverage footprint of other carriers, without those other carriers having to spend their own capital resources on the build-out of such rural areas. Commnet acts as a carriers’ carrier for most major wireless carriers in the United States, including, by way of example, Verizon Wireless, AT&T Mobility, Sprint Nextel, T-Mobile and Cricket, as well as over a hundred other domestic and international carriers. In a year, Commnet handles several hundred million minutes of voice traffic and over millions of megabytes of data usage on behalf of these other carriers.

Commnet never would have had the opportunity to commence operations, nor the opportunity to bring the benefits of wireless technology to so many remote areas, but for the Commission’s existing unserved area cellular regulatory regime, which was aimed at preventing spectrum warehousing in cellular and successfully met that goal. Even today, Commnet technicians are constantly researching to find remaining unserved areas, and driving those unserved areas to determine whether there is demand for service that Commnet can satisfy consistent with environmental and other concerns. When new areas are identified, Commnet continues to file applications, obtain licenses, and bring new service to more persons who need service. In the past year, Commnet filed unserved area applications for another eleven cell sites around the United States (several of which are pending at this time), and Commnet has several more projects in various pre-application stages.

Commnet, its entire business model, and its potential future customers would be greatly and adversely affected, not only by any changes to cellular licensing rules, but also by any “interim” freeze prohibiting the filing of unserved area cellular applications.

To the extent the CTIA Petition is directed at affording cellular licensees flexibility to modify their systems without undue paperwork or prior FCC approval, it is directed at a “problem” that has not existed since 1995, thanks to *Part 22 Rewrite, supra*, and the *Streamlining Notice, supra*. To the extent the CTIA Petition is directed to reducing the amount of data that needs to be maintained in the ULS concerning cellular licensees, it is not a reasonable way to attack the “problem”, because the same information will still be needed in ULS for both existing unserved area licensees and for all instances where an incumbent’s CGSA extends at all beyond its home market. Simply put, the CTIA Petition proposes to solve non-existent problems.

Moreover, in all past cases where the Commission converted incumbent site-based licenses to geographic-area licensing, it did so in the body of a larger rulemaking where the Commission also ordered the auction of the remaining white space. In no instance did the Commission just award the remaining white space for free to incumbent licensees.

The CTIA Petition proposes no standard whatsoever for how remaining white space would be divided among pre-existing co-channel formerly site-based licensees, except to say that unserved area licensees could “consult” with the holder of the earliest-licensed call sign within the market. This is a recipe for arbitrary and unfair decisions stacked in favor of the largest carriers at the expense of rural carriers.

Finally, the CTIA Petition’s proposal for an immediate freeze on the filing of unserved area cellular applications is contrary to the public interest and will delay the initiation of new

services in remote areas for years. Commnet has multiple pending unserved area applications, and imposing a freeze would preclude Commnet from timely initiating service in these rural areas. In addition, Commnet has several other targeted unserved areas still in the stage of lining up cell locations and complying with environmental and other regulatory obligations, and these projects too would be stopped in their tracks, harming the residents of those areas for no valid reason.

Taken together, the proposals in the CTIA Petition constitute a transparent scheme by which large, incumbent carriers would expropriate, without auction, unserved areas that they could have been serving for at least sixteen years, thereby denying Commnet and others the continuing ability to innovate and provide service where it is needed.

For all of the above reasons, the Commission should reject the CTIA Petition and should leave the current unserved area rules, which continue to serve the public interest well, in place.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

CTIA Petition for Rulemaking Regarding the)	
Transition of Part 22 Cellular Services to)	RM No. 11510
Geographic Market-Area Licensing)	

To: Chief, Wireless Telecommunications Bureau

COMMENTS OF COMMNET WIRELESS, LLC

Commnet Wireless, LLC (“Commnet”), by its attorneys and pursuant to the Public Notice, *Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking to Transition Part 22 Cellular Services to Geographic Market-Area Licensing*, DA 09-5, released January 5, 2009 (“Request for Comments Notice”), hereby submits its Comments opposing the “Petition for Rulemaking of CTIA – the Wireless Association®” (“CTIA Petition”) filed October 8, 2008.¹ As discussed herein, while Commnet has no objection *per se* to the conversion of Part 22 licenses to geographic-area based licenses, the CTIA Petition goes far beyond such a conversion, and contains many provisions which are totally contrary to the public interest. Further, the Commission should not impose the “interim” freeze CTIA requests because it would preclude expeditious service to areas in need of service. Accordingly, the CTIA Petition cannot, consistent with the public interest, form the basis for a rulemaking proceeding.

DESCRIPTION OF COMMNET AND ITS INTEREST

Commnet is a premier wireless carrier specializing in bringing service to rural and remote areas that the major national and regional carriers have declined to serve. Commnet serves as a

¹ These Comments are timely filed within thirty days of the publication of the Request for Comments Notice in the *Federal Register*, 74 *Fed. Reg.* 4036 (January 22, 2009).

“carriers’ carrier”, providing service to areas that other carriers do not serve, and thereby extending the effective coverage footprint of other carriers, without those other carriers having to spend their own capital resources on the build-out of such rural areas. Commnet acts as a carriers’ carrier for most major wireless carriers in the United States, including, by way of example, Verizon Wireless, AT&T Mobility, Sprint Nextel, T-Mobile and Cricket, as well as over a hundred other domestic and international carriers. In a year, Commnet handles several hundred million minutes of voice traffic and over millions of megabytes of data usage on behalf of these other carriers.

Although today Commnet operates using both PCS (Part 24) and cellular (Part 22) wireless spectrum, when Commnet first started out, it operated exclusively using Part 22 cellular spectrum, all of it obtained through the unserved area process. At that time, the incumbent cellular carriers, none of which had obtained their spectrum at auction and thus none of which had any incentive (as do auction winners) to put the spectrum to its highest and best use, had left vast portions of the United States either unserved, or served by only one of the two Part 22 carriers.² In addition, significant areas that were served by one carrier on paper remained unserved in the real world, either because they were “dead spots” covering entire towns, or because the incumbent carrier had succeeded in obtaining a CGSA based upon “alternative contours”, which alternative contours were *not* based upon any drive tests but only upon the use (or rather, misuse) of alternative propagation methodology which would falsely predict coverage where there was none.

It was into this environment that Commnet was born. Relying on creativity and innovation, Commnet constructed cell sites via the unserved area process where the major

² Under Part 22, there are two separate frequency blocks, the A-block and the B-block, and at the time, the rules did not provide for disaggregation.

carriers claimed a lack of demand. Commnet built with used equipment to save capital and used energy-efficient solar power and other cost-saving strategies to bring service to areas beyond the reach of electric utilities, making areas viable even with smaller traffic volumes. As a significant benefit from this process, Commnet greatly expanded the reach of 911 emergency services to remote areas, where a much higher percentage of overall voice traffic consists of emergency calls.

In a few years, Commnet established itself. Although Commnet is technically an “unserved area licensee,” its protected CGSA in southern Arizona covers more than one-half of the geographic area of the Tucson MSA. In addition, Commnet operates Part 22 cellular systems in northern Arizona, New Mexico, Nevada, Colorado, Wyoming, Montana, South Dakota, North Dakota and Florida.³ Altogether, Commnet operates some 61 unserved area cell sites in the United States, covering a population of 92,000 over an area of more than 41,000 square miles (an average population density of approximately 2.2 people per square mile).⁴

Commnet never would have had the opportunity to commence operations, nor the opportunity to bring the benefits of wireless technology to so many remote areas, but for the Commission’s existing regulatory regime, which was aimed at preventing spectrum warehousing in cellular and successfully met that goal. Even today, Commnet technicians are constantly researching to find remaining unserved areas, and driving those unserved areas to determine

³ The Florida system, not an unserved area license, is majority-owned and –controlled by an unaffiliated entity, but is included within Commnet’s roaming agreements and treated as part of the Commnet coverage footprint for purposes of Commnet’s carrier/customers. The portion of the Nevada cellular system inside Nevada RSA No. 1 likewise is not unserved area.

⁴ In addition, Commnet operates over 250 PCS-band Part 24 cell sites, not only in the states mentioned above, but also in Iowa, Kansas and Missouri. The base station, population and square mile figures in the above text do NOT include either PCS coverage or “incumbent” cellular coverage inside Florida RSA No. 1 or Nevada RSA No. 1, but only unserved area cellular coverage.

whether there is demand for service that Commnet can satisfy consistent with environmental and other concerns. When new areas are identified, Commnet continues to file applications, obtain licenses, and bring new service to more persons who need service. In the past year, Commnet filed unserved area applications for another eleven cell sites around the United States (several of which are pending at this time), and Commnet has several more projects in various pre-application stages.⁵

As the Commission may be aware, some of the retail carriers that are Commnet roaming partners have begun to deny subscriptions to persons residing and incurring a significant portion of minutes used outside the retail carrier's native coverage area. As a result, Commnet has initiated a project to establish its own retail presence in those areas and offer subscriptions to residents where economically feasible, at least where Commnet would be eligible to receive universal service support as an eligible telecommunications carrier ("ETC") to help cover the additional expense of retail distribution and customer support. Commnet is planning to initiate retail service in areas where it receives ETC status before the end of 2009. This is just another example of Commnet using innovation to extend the benefits of wireless technology to consumers in rural and remote areas of the country.

Commnet, its entire business model, and its potential future customers would be greatly and adversely affected, not only by any changes to cellular licensing rules, but also by any

⁵ In remaining unserved areas, environmental concerns often are a significant issue. Many potential service areas are close enough to Native American reservations or National Parks to require significant study as to where cell sites can be located without impinging. In addition, one must determine how remote cell sites, once constructed, can be connected back to the cellular switch and ultimately the PSTN without causing harm. Coordination with National Park personnel, tribal historic preservation officials and state environmental officials is critical. It is not simply a matter of plotting coverage on a map and then filing an application with the FCC.

“interim” freeze prohibiting the filing of unserved area cellular applications.⁶ Thus, Commnet has a strong interest in participating in this proceeding to express its objection to proposals in the CTIA Petition.

DISCUSSION

I. The CTIA Petition Is Not the Best Way to Achieve Its Stated Policy Goals

CTIA says that its proposal is aimed at: (1) redefining cellular coverage areas to more accurately reflect actual coverage areas in light of the now-completed transition from analog to digital technology; (2) reducing the amount of technical information that the Commission would need to collect from cellular licensees and maintain in the Universal Licensing System (“ULS”); (3) “creat[ing] regulatory parity with other competitive CMRS offerings by applying a technology-neutral framework”; and (4) “affording cellular carriers the flexibility granted to their competitors to rapidly modify their systems to meet local market needs.”⁷ However, the CTIA Petition does not present a rational method for implementing these goals, nor does it even lay an adequate foundation for change. Indeed, several of these goals are better advanced by the current regulatory regime.

The CTIA Petition, pp. 9-10, without citation, misstates the original rationale for the current policy on licensing cellular spectrum. CTIA claims that the current rules developed “in response to limited cellular competition.” *Id.* To the contrary, the current rules developed because the spectrum was not awarded via auction but was granted free of charge, and therefore the Commission was concerned about spectrum warehousing. To prevent such abuse, the

⁶ So-called “interim” freezes imposed by the FCC in other contexts have often lasted for many years, becoming *de facto* permanent freezes. For example, in 1995, the Commission imposed a “temporary freeze” on the filing of 800 MHz applications. *Licensing of General Category Frequencies in the 806-809.750/851-854.750 MHz Bands*, 10 FCC Rcd 13190 (WTB, 1995) (“800 MHz Freeze Order”). That freeze remains in effect to this day.

⁷ CTIA Petition, p.6.

Commission required incumbent carriers that paid nothing for their spectrum to “use it or lose it” within five years of initial grant. Thereafter, companies like Commnet that were willing to invest and serve those areas had (and continue to have) access to the spectrum to do so. In establishing this regulatory structure, the Commission successfully balanced the need for initial licensees to gather data on distribution of demand and modify their systems accordingly, while preventing spectrum warehousing and facilitating opportunities for licensees willing to provide service.⁸ Commnet’s footprint illustrates the unassailable success of the Commission’s “use it or lose it” rules, which extended service to more new areas much more rapidly than would have been the case under rules – like those proposed by CTIA – that promote spectrum warehousing.

Equally false is the implication created by CTIA that existing CGSAs based on the 32 dBu standard “may understate digital coverage.” CTIA Petition, p.7. In a country as vast as the United States, there may be occasional such examples (none of which it cites). However, in Commnet’s “hands-on” experience over many years, those few examples are far outnumbered by the numerous “dead spots,” often extending many square miles, which have no reliable coverage but are nonetheless lawfully warehoused by licensed carriers because, on paper, they lie within the 32 dBu contours (or worse, within “alternative” coverage contours that were awarded CGSA status pursuant to Section 22.911(b) without any drive tests).⁹

⁸ See *Amendment of the Commission’s Rules for Rural Cellular Service*, 2 FCC Rcd 2306, 2308-09 (1987):

[P]otential applicants who are interested in serving the unserved portions of MSAs will have the opportunity to implement their proposals designed to serve the public in these areas. Thus, the proposed licensing scheme that we adopt herein will provide an equitable balance between the competing service plans of existing licensees/permittees and the parties wanting to provide [unserved area] service.

⁹ The CTIA Petition, p. 15, proposes extending the protected CGSAs of carriers where their reliable digital coverage extends beyond their protected CGSA as calculated by reference to

II. The Current Rules Are Technology-Neutral and Allow Carriers to Rapidly Modify Their Systems to Meet Local Market Needs

As CTIA admits, different technologies will yield different reliable service areas at the same height and power.¹⁰ CDMA technology has different propagation characteristics than does GSM, for example. The current rules provide for carriers to choose which digital technology they want to implement, and even to change that choice without further Commission approval (as many did in moving from TDMA to either GSM or CDMA). Carriers are entitled to *interference protection* from co-channel carriers based upon the 32 dBu contour standard – a standard that has been administratively convenient to maintain for almost twenty years now, and which (not being based upon *any particular* digital technology) gives no preference to one digital technology over any other.

Although the 32 dBu standard defines the area of interference protection, as even CTIA admits, it does not obligate a carrier to maintain analog cell sites at all, or to maintain cell sites at the precise locations set forth in the body of the license. Rather, it simply requires a carrier to certify to the Commission that its digital cellular system will reliably provide coverage within the composite 32 dBu contours. That service, *under existing rules*, can be accomplished by any combination of technical adjustments, including (by way of example) higher-powered digital cell sites whose coverage stays within the analog-predicted contour, fill-in sites, sectorized sites, or sites with enhanced receive antennas to ensure reliable two-way conversations. As discussed in the following paragraph, *under existing rules*, cellular carriers can dynamically and immediately respond to changing market conditions by making these and other technical changes to their

32 dBu contours. Unless such a change is coupled with the deletion of all real-world dead spots of at least 50 square miles in size from licensed areas, it would be irrational and arbitrary.

¹⁰ *Id.* at p.6.

systems, so long as, at the end of the day, they are not extending their reliable service area coverage beyond their licensed service area.

The CTIA Petition asserts that if its proposal is accepted, “[t]he Commission will no longer be required to accept and review applications for changes that do not affect service to the public.”¹¹ However, *under the existing rules*, in place since at least 1995, the Commission does not have to accept or review such changes! *See Revision of Part 22 of the Commission’s Rules Governing the Public Mobile Services*, 9 FCC Rcd 6513, 6518-19 (1994) (“*Part 22 Rewrite*”), which said:

In the Notice [of proposed rulemaking], we proposed to remove the requirement that licensees notify the Commission when they make “permissive” minor modifications to their stations or add new “internal” transmitters to existing systems. We believe that most of the notifications filed simply to satisfy this requirement are unnecessary because the information is not needed by the Commission staff, other licensees or the public. Adoption of this proposal would reduce the number of notifications filed and thus conserve Commission and industry resources.

* * *

We adopt new Sections 22.163 and 22.165 [eliminating the filing requirements for minor modifications] essentially as proposed. . . . [H]owever, we accept the suggestion made by many of the commenters and retain the notification requirement for the addition or modification (under these new rule sections) of cell sites that form a CGSA boundary in order that licensees of adjacent cellular systems will be able to assess interference potential correctly when designing or modifying their systems. We note that generally the record supports eliminating the notification requirement for most additions and modifications and that our doing so will save substantial industry and Commission resources.

Section 22.165 remains in effect to this day, as does the definition of a “fill-in” transmitter in Section 22.99 (which transmitters may be constructed and operated without filing any application or notification to the Commission unless they create special environmental or international border issues). *See also* Public Notice, Report No. CL-95-72, *Commercial Wireless Division Announces the Clarification and Streamlining of Processing Procedures for the*

¹¹ *Id.*, p.9.

Cellular Radiotelephone Service, 77 RR2d 774 (1995) (“*Streamlining Notice*”), which stated in pertinent part (emphasis added):

Part 22 licensees may make minor modifications to existing stations without obtaining prior Commission approval. Licensees may also add additional transmitter sites without prior Commission approval so long as the provisions of Section 22.165 are met. **The Part 22 Rewrite, Report and Order**, CC Docket No. 92-115, 9 FCC Rcd 6513 (1994), **eliminated the requirement that licensees notify the Commission when they make minor modifications to their stations or add new internal transmitter sites to existing systems**, except that cellular licensees are still required to notify the Commission of any modifications that change their Cellular Geographic Service Area (CGSA) boundary.

As is clear, a carrier can, if it desires, overlay its system with a new and different technology and then rip out the old technology, all without seeking or obtaining any Commission approval whatsoever. The notion that new rules are needed to achieve technology neutrality or to enable rapid modifications to cellular systems is simply false.

III. Changing to Geographic-Area Licensing Would Not, in the Absence of a Spectrum Give-Away, Reduce the Amount of Technical Information for ULS to Collect and Maintain

In other cases where the Commission has allowed incumbent site-based licensees to convert their licenses to geographic-area licenses, there has been no reduction in the amount of information required to be collected and maintained. Thus, in 800 MHz SMR, paging and BRS/EBS, when site-based carriers were allowed or required to convert their site-based licenses into geographic-area licenses, the new geographic-area licenses were based upon the composite reliable service area contours of the former site-based licenses.¹² *In none of these cases were*

¹² See, e.g., *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Band, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463, 1514-15 (1995) (“*800 MHz First Report and Order*”) (“Incumbents seeking such reissued [geographic area] licenses, however, must make a one-time filing of specific information for each of their external base station sites to assist the staff in updating the Commission's database after the close of the auction [for all remaining white space in upper 800 MHz SMR band].”); *Amendment of Part 90*

incumbent site-based licensees allowed to increase their licensed service areas to include remaining white space in their BTAs, EAs or MEAs. Thus, in each case, the Commission still had to maintain a record of what the site-based licensed service areas had been, in order to determine what white spaces remained and thus what areas the incumbent licensees were still prohibited from serving.¹³

The CTIA Petition attempts to avoid this result by departing from the Commission's approach in all past cases. Specifically, in each of the past cases cited by the CTIA Petition, pp. 11-13, the Commission combined the switch to geographic area licensing with an auction of remaining white spaces. In stark contrast, the CTIA Petition, p. 14, proposes to just give all remaining white space away to the very same carriers that for fifteen (most RSAs) to twenty-three (early MSAs) years declined to make any investment to serve that white space. Only through this novel and unprecedented wrinkle -- making sure the incumbent always expropriates

of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Band, Second Report and Order, 12 FCC Rcd 19079, 19106 (1997) ("*800 MHz Second Report and Order*") ("Incumbents seeking such reissued [geographic area] licenses must make a one-time filing of specific information for each of their external base station sites to update our database. Such filings should be made on Form 600 and should include a detailed map of the area the system will cover.").

In the case of BRS (formerly MDS), the Commission switched incumbents from site-based licenses to geographic area licenses corresponding to a 35-mile radius around the licensed site-based transmit site. *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Report and Order*, 10 FCC Rcd 9589, 9603-04 (1995) ("*MDS Order*"). This required the Commission to maintain in its database each of those pre-existing site-based license coordinates.

¹³ The move from site-based licensing enabled carriers in these other services to obtain flexibility. Thus, for example, a BRS licensee no longer needs to maintain a transmitter at the center of its 35-mile radius protected service area ("PSA"), but can implement digital broadband by using a multitude of mini-cells to collectively cover that PSA. However, the Commission still maintains a record of where that former site-based transmitter location was, in order to calculate the new 35-mile radius geographic license area. And to repeat, in cellular, incumbent carriers already have this sort of flexibility. See Part II, *supra*.

the adjacent white space it historically declined to serve -- that would enable the Commission to reduce the amount of information collected and maintained.

IV. The Proposal on How to Give Away the Remaining White Space Is Irrational and Unfair to Rural Carriers Such as Commnet

Of course, there are two huge problems with the approach of the CTIA Petition. In the real world, (1) the actual coverage area of incumbent site-based licenses do not neatly stay within cellular market area (“CMA”) boundaries, and (2) there are frequently more than one incumbent site-based licensee within a single CMA. To solve these problems, the CTIA Petition, pp. 14-15, proposes to delegate to the holder of the longest-existing incumbent site-based call sign in each CMA the power to decide how to divide remaining white space among incumbents within a CMA. Other holders of incumbent cellular licenses, such as Commnet, are almost completely shut out.

Specifically, the CTIA Petition, pp.14-15, proposes that where there is an unserved area licensee such as Commnet, the unserved area licensee would “consult” with the other co-channel incumbent carrier on how to divide the remaining white space in the CMA, and says that where such consultation does not result in an agreement, the Commission would arbitrate. However, the CTIA Petition proposes absolutely no standard for the Commission to use when acting as arbitrator.

This is tantamount to saying the larger carrier always wins. In the absence of a pre-determined standard for how to resolve such disputes – a standard which will ensure fairness to rural carriers such as Commnet – CTIA’s proposal to have carriers “consult” is irrational and arbitrary.

V. The Proposed “Interim” Freeze Is Contrary to the Public Interest and Will Block the Initiation of Service to Additional Rural Areas Indefinitely

The Commission imposed an “interim” freeze on the filing of 800 MHz applications in 1995;¹⁴ that freeze remains in place to this day. When the Commission imposed an “interim” freeze on the filing of applications in other services, such as BRS (formerly MDS) and paging, it was so that the Commission could auction all remaining white space and thereby obviate the need for future applications to serve unserved areas. Freezes, by their very nature, delay the initiation of new service. That the Commission sometimes finds them a necessary evil in cases where they provide the Commission staff with administrative convenience does not mitigate the harm that freezes cause to unserved areas. Here, by CTIA’s own admission, there is no threat to administrative convenience and no countervailing public benefit from imposing a freeze.

CTIA claims there are virtually no unserved area applications being filed except by adjacent carriers seeking to add locations to pre-existing nearby systems. CTIA Petition, p.10 & n.23. Therefore, there is no need to impose a freeze, because there is no great burden on the Commission staff, and there would not be any “influx” of applications during the pendency of a rulemaking. However, imposing a freeze would preclude additional areas from receiving service

¹⁴ See *800 MHz Freeze Order*, *supra*. The Commission there explained the temporary nature of what is now a freeze in effect for over thirteen years and counting:

[U]nless we immediately freeze new applications the successful resolution of the spectrum allocation issues raised in PR Docket No. 93-144 [the 800 MHz geographic area licensing proceeding] could be compromised. **Freezing acceptance of these applications is a temporary action that would preserve the current licensing landscape of the General Category and allow resolution of the issues regarding future licensing of these channels in PR Docket No. 93-144. We anticipate that this action will be of limited duration**, because the Commission intends to resolve expeditiously the issues presented in PR Docket No. 93-144.

(Emphasis added.)

for several years, while a rulemaking proceeding slowly meanders its way through the regulatory process.

Commnet and the residents of areas where Commnet is trying to initiate service would be particularly harmed by imposing a freeze. Commnet currently has four pending unserved area applications, all of which are unopposed and three of which are not mutually-exclusive with any other pending application. The people who live, and the small companies that conduct business in these rural areas are in need of immediate service – none should be required to wait for several years until a rulemaking proceeding is concluded and the freeze is lifted. This is especially so considering that there is no reason to believe an incumbent would construct in the areas Commnet is currently seeking to serve, even if it received the spectrum. Under the CTIA proposal, the incumbent would not have acquired this white space at auction, and thus would have no sunk investment to recover by building. In most cases, the incumbent did not apply for the spectrum over at least sixteen years, when it easily could have done so.¹⁵

Even in the case of the Commnet mutually-exclusive application, the competing applicant is a newcomer, not the incumbent.¹⁶ So even here, the current rules are more conducive to the rapid initiation of service than would be the new regime proposed by CTIA. Any freeze, especially if accompanied by a dismissal of pending applications, would be contrary to the public interest.

¹⁵ In the one case respecting Commnet's pending applications where an incumbent once applied, that incumbent formerly operated in the area, but took its cell down and canceled the location. *See WWC Holding Co., Inc.*, FCC File No. 0003654576, deletion of location no. 8.

¹⁶ *See* FCC File No. 0003373018, which has been pending since August 5, 2008. This newcomer apparently has never constructed a cellular system. The newcomer successfully obtained a greenmail settlement in one case prior to the establishment of the anti-greenmail rule, and a waiver of the anti-greenmail rule in another case, to collectively enable it to receive millions of dollars in greenmail. Commnet is hopeful the Commission can schedule these mutually-exclusive applications for auction in the near future, as the mere act of scheduling the auction would remove any greenmail leverage.

Aside from the matter of Commnet's currently-pending applications, Commnet has other potential unserved area facilities in various pre-applications stages of development. A freeze would stop these other projects cold, wipe out Commnet's investment of time and resources made to date on those projects and, most importantly, preclude service to these areas for at least the length of the rulemaking proceeding. (To repeat, once a rulemaking proceeding was eventually concluded and the unserved area awarded to the largest incumbent carrier in the market, there is still no reason to believe that carrier would take any steps to initiate service.) Again, a freeze on the filing of unserved area applications is contrary to the public interest.

If the Commission determines, nonetheless, to initiate a rulemaking proceeding and impose a freeze on applications during the pendency of the rulemaking, then at a minimum, to ameliorate the harm to the rural public, the Commission should: (1) continue to process all pending unserved area applications, including conducting an auction in all cases of mutual exclusivity; (2) exempt from the freeze any application filed by a carrier that already operates a cell site within 75 miles of the new proposed site, so that projects in process can be followed through to completion; and (3) clarify in the notice of proposed rulemaking that an incumbent carrier will only receive as new licensed area whatever is left *after* the processing of all such unserved area applications.

CONCLUSION

To the extent the CTIA Petition is directed at affording cellular licensees flexibility to modify their systems without undue paperwork or prior FCC approval, it is directed at a "problem" that has not existed since 1995, thanks to *Part 22 Rewrite, supra*, and the *Streamlining Notice, supra*. To the extent the CTIA Petition is directed to reducing the amount of data that needs to be maintained in the ULS concerning cellular licensees, it is not a

reasonable way to attack the “problem”, because the same information will still be needed in ULS for both existing unserved area licensees and for all instances where an incumbent’s CGSA extends at all beyond its home market. Simply put, the CTIA Petition proposes to solve non-existent problems.

Moreover, in all past cases where the Commission converted incumbent site-based licenses to geographic-area licensing, it did so in the body of a larger rulemaking where the Commission also ordered the auction of the remaining white space. In no instance did the Commission just award the remaining white space for free to incumbent licensees.

The CTIA Petition proposes no standard whatsoever for how remaining white space would be divided among pre-existing co-channel formerly site-based licensees, except to say that unserved area licensees could “consult” with the holder of the earliest-licensed call sign within the market. This is a recipe for arbitrary and unfair decisions stacked in favor of the largest carriers at the expense of rural carriers.

Finally, the CTIA Petition’s proposal for an immediate freeze on the filing of unserved area cellular applications is contrary to the public interest and will delay the initiation of new services in remote areas for years. Commnet has multiple pending unserved area applications, and imposing a freeze would preclude Commnet from timely initiating service in these rural areas. In addition, Commnet has several other targeted unserved areas still in the stage of lining up cell locations and complying with environmental and other regulatory obligations, and these projects too would be stopped in their tracks, harming the residents of those areas for no valid reason.

Taken together, the proposals in the CTIA Petition constitute a transparent scheme by which large, incumbent carriers would expropriate, without auction, unserved areas that they

could have been serving for at least sixteen years, thereby denying Commnet and others the continuing ability to innovate and provide service where it is needed.


For all of the above reasons, the Commission should reject the CTIA Petition and should leave the current unserved area rules, which continue to serve the public interest well, in place.

Respectfully submitted,

COMMNET WIRELESS, LLC

February 23, 2009

By: _____


David J. Kaufman
Stephen E. Coran
Its Attorneys

Rini Coran, PC
1615 L Street NW, Suite 1325
Washington, DC 20036
(202)-296-2007